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No. 91-1885

In The
Supreme Court of the United States
October Term, 1992

PETE WILSON, in his official capacity as Governor of the State of California, BENJAMIN T. HACKER, as Director of the State Department of Veterans Affairs; STATE DEPARTMENT OF VETERANS AFFAIRS; and THE STATE OF CALIFORNIA
Petitioners,

vs.

CHARLES DEL MONTE, NICHOLAS DEL MONTE, ANDREW DEL MONTE, and MICHAEL GURECKAS, Individually and on Behalf of the Class They Represent; JOAN DEL MONTE, KARL SEUTHE, CLYDE McCOWN, and JOHN RIGNEY, Individually and as Tax Payers,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for the Respondents in Opposition

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QUESTIONS PRESENTED FOR REVIEW

1. DOES THE CALIFORNIA STATUTORY REQUIREMENT OF STATE RESIDENCE AT BIRTH OR AT TIME OF ENTRY INTO MILITARY SERVICE AS A CONDITION OF ELIGIBILITY FOR CERTAIN VETERANS' BENEFITS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case.

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STATUTES

Military and Veterans Code

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Respondents Charles Del Monte, et al., respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the California Supreme Court's opinion in this case.

The Opinion of the California Supreme Court is set forth in the Petitioners' Appendix at pp. A1-A19.

STATUTES INVOLVED

Military and Veterans Code

§890. Definitions

As used in this article:

(a) "Veterans" means (1) any person who served in the Army, Navy, or Marine Corps of the United States and was killed in action or died as a result of war service in the World War since April 6, 1917; (2) any member of the Army, Navy, Coast Guard or Marine Corps of the United States, or any of their auxiliaries who was killed in action in World War II on or after December 7, 1941, and prior to January 1, 1947, or who died at any time as a result of way service during such period; (3)

any member of the armed forces of the United States who was killed in action during any period of hostilities in which the United States is engaged, or who died or was totally disabled at any time as a result of active service during any such period or during the induction period; or (4) any person who, at the time of entry into the armed forces of the United States was a resident of this state and was subsequently declared by the United States government to be missing in action, captured in the line of duty by hostile forces, or forcibly detained or interned in the line of duty by a foreign government or power.

(b) "Defendant of a veteran" means the natural or adopted child of a veteran, or stepchild of a veteran as defined by the U.S. Veterans Administration for compensation purposes, the unmarried

widow of a veteran, or the wife of a totally disabled veteran.

(c) "Induction period" means (1) the period beginning September 16, 1940, and ending December 6, 1941, and the period beginning January 1, 1947, and ending June 26, 1950, and (2) the period beginning on February 1, 1955, and ending on the date before the first day thereafter on which individuals (other than individuals liable for induction by reason of a prior deferment) are no longer liable for induction for training and service into the armed forces under the Universal Military Training and Service Act.

Military and Veterans Code

§980. "Veteran" defined; Person not included

(a) As used in this chapter, "veteran"

means any of the following:

(1) Any citizen of the United States who served in the active military, naval or air service of the United States on or after April 6, 1917, and prior to November 12, 1918; received an honorable discharge or was released from active duty under honorable conditions; was, at the time of entry into active duty, a native or a bona fide resident of this state or, if a minor at that time, entered active duty while in this state; and had lived in this state for six months immediately preceding entry into active duty.

(2) Any person who served in the active military, naval, or air service of the United States for a period of not less than 90 consecutive days or was discharged from the service due to a service-connected disability within that

90-day period; received an honorable discharge or was released from active duty under honorable conditions; was at the time of entry into active duty a native or bona fide resident of this state or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty; and performed any portion of that service during any of the following periods:

(A) On or after December 7, 1941, and prior to January 1, 1947.

(B) On or after June 27, 1950, and prior to February 1, 1955.

(C) On or after August 5, 1964, and prior to May 8, 1975.

(D) On or after August 2, 1990, to and including the date on which the territories in an around the Arabian

Peninsula cease to be designed as a place where the armed forces of the United States are engaged in combat, as described in Executive Order 12744 of the President of the United States. It is the intent of the Legislature, in enacting this subparagraph, that the benefits provided by this chapter shall be available to all veterans who were on active duty in the armed forces of the United States or who were called to active duty in the reserves or National Guard during the pendency of the deployment of forces for Operation Desert Shield or Desert Storm, which resulted in Executive Order 12744, irrespective of whether these veterans serves overseas or in the United States.

(E) At any time, in a campaign or expedition for service in which a medal has been authorized by the government of

the United States, regardless of the number of days on active duty.

(3) Any member of the services or National Guard who is called to, and released from, active duty, regardless of the number of days served; called during any period when a presidential executive order specifies the United States is engaged in combat; received an honorable discharge or was released from active duty under honorable conditions; was at the time of entry into active duty a native of, or bona fide resident of this state or, if a minor at that time, entered active duty while in this state and had lived in this state for six months immediately preceding entry into active duty.

(b) This chapter does not include any of the following:

(1) A person who was separated from the

armed forces under other than honorable conditions.

(2) A person who was separated from the armed forces on account of alienage.

(3) A person who performed no military duty whatever or refused to wear the uniform.

(4) A person who has received from another state a bonus, compensation, or benefit, the prerequisite of which is service in the armed forces, which service is the basis for the claim of benefits under this chapter.

(5) A person who served only in an auxiliary or reserved component of the armed forces whose service therein did not provide an exemption from the operation of the Selective Training and Service Act of 1940 (54 Stat. 885, as amended).

(6) A person whose service with the armed

forces was due to temporary active duty orders for the sole purpose of training duty, processing, or a physical examination.

(7) A person whose only service during a qualifying period was as a student at a military academy and who, for any reason, failed to complete the course of study and subsequently did not serve on active duty.

STATEMENT OF THE CASE

The statutes at issue mandate that no veteran may get certain benefits (called Cal-Vet Benefits) unless he or she was "a native of California" or "a bona fide resident of California at the time of entry into active military service." The term "native" has gone undefined but can reasonably be construed

as merely having been born in the state of California with no other substantial contacts thereafter.

The Petitioners' summary of material facts accurately sets forth the facts of this case; however, it fails to mention that in the courts below, Petitioners repeatedly argued that while a veteran may not be eligible for benefits, if the veteran rejoins the service from California he or she could then qualify for these benefits. This argument is of little avail to the two Plaintiffs in this action who became disabled as a result of their military service.

Plaintiff Charles Del Monte became disabled as a result of his service in the Korean conflict. Plaintiff Michael Gureckas became a paraplegic as a result of his fighter pilot service in Viet Nam. It is highly unlikely that either Mr. Del

Monte or Mr. Gureckas will be able to return to service. Further, since Plaintiffs Carl Seuthe, Clyde McCown and John Rigney served in World War II, it is equally unlikely that they would be accepted should they reapply for military service.

PROCEDURAL HISTORY

The procedural history as set forth by the Petitioners is essentially correct.

REASONS FOR DISALLOWANCE OF THE WRIT

The Petitioners maintain that this is a case wherein "a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court." Petition for

Writ of Certiorari, p.9. Under this, or any other standard, the Petition must fail. This Court has ruled repeatedly that virtually the identical statutes in question are unconstitutional as a denial of equal protection. Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465 (1985); and Attorney General of New York v. Soto Lopez, 476 U.S. 898, 106 S.Ct. 2317 (1986).

The gist of Petitioners' argument is that the above cases should be overturned. Petitioners are quite openly hoping that the recent changes on this Court might result in overturning precedent which has been unchanged and consistent since their determination.

ARGUMENT

The question of the constitutionality of state veterans' "residence at time of entry" requirements has been settled definitively by this Court.

I. THE UNITED STATES SUPREME COURT HAS CONSISTENTLY RULED THAT CONDITIONING STATE BENEFITS ON STATE RESIDENCY AS OF A FIXED TIME VIOLATES THE EQUAL PROTECTION CLAUSE. THE RESTRICTIONS AT ISSUE ARE UNCONSTITUTIONAL.

The Fourteenth Amendment of the United States Constitution prohibits a state from limiting eligibility for benefits to individuals who were state residents as of a certain date. Any doubt as to the constitutionality of such provisions has been unequivocally resolved by a series of Supreme Court cases.

In Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309 (1982) Alaska residents challenged the constitutionality of a certain state dividend distribution plan, which distributed state income in varying amounts to citizens, based upon their length of residency in the state. Under the plan, each citizen eighteen years of age or older would receive one dividend unit for each year of residency since 1959, the first year of statehood. Plaintiffs, state residents of the state since 1978, claimed that the plan violated their rights to Equal Protection and to travel to Alaska, to establish residency, and to enjoy the same rights as other state residents.

At the outset, the Court determined that the statute indeed classified Alaskan residents into separate categories, thereby triggering an equal

protection analysis.

In analyzing the plaintiffs' equal protection claims, this Court declined to decide which standard of review should be applied. Instead, it determined that, even under the more lenient minimum rationality standard, the distribution plan violated the Equal Protection Clause. Id. at 59-61.

Alaska advanced three justifications for its system of classifying residents for receipt of benefits: 1) the creation of a financial incentive for individuals to move to Alaska and establish residency; 2) the encouragement of prudent management of Alaska's mineral surplus fund; and 3) the recognition and rewarding of residents based upon the contributions they have made during their years of residency. Id. at 61. The Court quickly dismissed the first two

justifications as insufficient; both could be served equally well by distributing benefits to all residents in equal amounts. Id. at 62-63. The third state interest failed as an illegitimate purpose. Citing Shapiro v. Thompson, 394 U.S. 618, 632-633, 89 S.Ct. 1322, 1330, (1969) the Court warned that such a system of rewards could open the door to the apportionment of all state services and benefits based upon years of residency, a clearly impermissible result. Id. at 64. Thus, Alaska advanced "no valid state interests which are rationally served by the distinction" it made between its citizens. Id. at 65.

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985), decided three years after Zobel, involved a veterans' property tax exemption. New Mexico allowed a $2000

exemption for veterans who had resided in the state since before May 8, 1975, as well as other benefits. Plaintiff, a Vietnam veteran who established residency in New Mexico in 1981 and who was denied the exemption, challenged the residency requirement on both equal protection and right-to-migrate grounds.

As in Zobel, the Court noted that New Mexico's tax exemption statute created two classes of people: (1) resident veterans who lived in the state before May 8, 1976 who qualified for the exemption; and (2) resident veterans who moved to the state after that date, who did not. As such, the statute distinguished between bona fide state residents based upon their length of residency in New Mexico. 472 U.S. at 617.

The Supreme Court again struck the

fixed-point residency requirement as violative of the Equal Protection Clause, in that it was not rationally related to any legitimate state interest. Id. at 624. The Court distinguished a fixed-point residency requirement, such as this one, from legitimate "threshold waiting periods" (employed as a test of bona fide residency); singling out the former as unconstitutional. Id. at 616-617.

New Mexico proffered two of the same justifications advanced by Alaska in Zobel: 1) the encouragement of citizens to settle in New Mexico, and 2) the expression of appreciation to "its own citizens for honorable military service." Id. at 618-619. The Zobel Court had already ruled that a fixed residency requirement does not rationally further the goal of encouraging the migration of veterans to a state. In Hooper, the

Court reaffirmed that position, noting further that some residents might actually be discouraged from settling in New Mexico, since new arrivals were specifically ineligible for the veterans' tax exemption. "The separation of residents into classes hardly seems a likely way to persuade new [residents] that the State welcomes them and wants them to stay." Hooper, 472 U.S. at 619-620, citing Zobel, 457 U.S. at 62, n. 9.

With respect to the second state interest, the Court recognized as legitimate the goal of rewarding veterans for their wartime service. But, again, ruled that restricting eligibility to only those who were state residents as of a certain fixed date bore no rational relationship to the state's interest.

Finally, the Hooper Court rejected the argument that the distinction was

merited by the State's obligation to care for "its own." "Newcomers, by establishing bona fide residence in the state, become the state's 'own' and may not be discriminated against solely on the basis of their arrival in the state after [a fixed date]." Id. at 623.

The Supreme Court similarly invalidated a Vermont use tax exemption on Equal Protection grounds in Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465 (1985). Vermont exempted from an automobile use tax requirement only those Vermont residents who had lived in Vermont at the time they purchased their cars out of state. The Court stated, "we perceive no legitimate purpose...that is furthered by this discriminatory exemption ... [R]esidence at the time of purchase is a wholly arbitrary basis on which to distinguish between present

Vermont registrants." 472 U.S. at 23, 105 S.Ct. at 2471-72.

Zobel, Hooper and Williams are clearly dispositive of the instant case. The State of California has conditioned, whether directly, by statute, or indirectly, by a provision in the Budget Act, eligibility for several veterans' benefits on the veteran's having been a state resident as of a particular time in history. The fixed-point residency requirements in Military & Veterans Code Sections 980 and 890(a)(4) and Item 1960 of each Annual Budget Act are virtually identical to those previously found to be unconstitutional.

The Petitioners have not offered a single justification not already specifically rejected by this Court. Their arguments are simply contrary to established precedent.

Lastly, in Attorney General of New York v. Soto Lopez, supra, while ruling on the relevant issues as they apply to the instant case, this Court was quite clear. A majority of this Court determined that the statute in question failed to satisfy the rational basis test under the equal protection clause. Soto Lopez, supra, 476 U.S. at 913. Thus, the Soto Lopez case is of no avail to Petitioners. This Court, by a plurality of five judges, determined that a virtually identical statute violated the equal protection clause. There were other issues litigated in the case, but in ruling on the prime issue, that of equal protection, there was clearly a plurality which determined that, under the less stringent rational basis test, the statute failed. As the California Supreme Court described in the case

below, the statute in question is virtually identical to those statutes in Zobel, Hooper, and Soto Lopez.

CONCLUSION

In order for this Court to take this case, it must be willing to disregard and, in effect, overturn four of its prior decisions. Then, and only then, can this Court take the case.

There is no unsettled area of law as it relates to statutes such as the one in question. The cases which this Court has determined have ruled directly on point that these constitute denials of equal protection. This Court should not accept

this offer to overturn years of precedent. Certiorari should not be granted.

Dated: October 16, 1992

Respectfully submitted,

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